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No. 729

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

JOSEPH B. DECKER, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Your petitioner, Joseph B. Decker, prays that writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above cause on January 21, 1944, affirming the judgment of the United States District Court for the District of Maryland.

Opinions Below.

The opinion of the district court overruling demurrer (R. 12) is not officially reported. The opinion of the same court on motion in arrest of judgment and for new trial (R. 55) is reported in 51 F. Supp. 15. The opinion of the

circuit court of appeals (R. 122) is not yet officially reported.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on January 21, 1944 (R. 125). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether on indictment for use of the mails to defraud, where the scheme to defraud alleged, and shown by the evidence, is that of a managing vice president to defraud a corporation by drawing corporation checks on a Pittsburgh bank, payable to his secretary, charging such checks on the books to "commissions" and causing her to cash them at an Elkton, Maryland, bank and deliver the money to him—Whether the evidence is sufficient as a matter of law to show use of the mails "for the purpose of executing such scheme" within the meaning of the statute when the only use of the mails in evidence is the subsequent mailing by the Elkton bank of each check to Pittsburgh for payment after the Elkton bank had become the holder in due course, after the loss to the corporation thereon was beyond prevention and after the fraud so far as each such check was concerned had been fully consummated by the payment of cash to the defendant.

2. Whether—after the defendant has obtained the cash proceeds of such check and after the victim's liability thereon has become unavoidable and the fraud as to that check has thus been consummated—the subsequent mailing of the check for collection by an innocent holder in due course may nevertheless be held as a matter of law to be a

mailing "for the purpose of executing such scheme" merely because the scheme is shown to have contemplated the cashing of a series of such checks.

Statute Involved.

The Act of March 4, 1909, c. 321, Sec. 215, 35 Stat. 1130 (18 U. S. C. Sec. 338) provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall *for the purpose of executing such scheme* or artifice or attempting so to do, place, or cause to be placed, any letter, * * * [or] writing, * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Emphasis supplied.)

Statement.

Indictment.—Appellant, with Gustav H. Kann, was named defendant in an indictment in five counts, each of which alleged use of the mails in violation of the mail fraud statute (18 U. S. C., Sec. 338) in furtherance of an alleged scheme to defraud Triumph Explosives, Incorporated, its stockholders and the Peoples-Pittsburgh Trust Company. Briefly, the indictment alleged that Kann, as President, and Decker, as Vice President and General Manager, devised a scheme to misappropriate the funds of the company by causing Decker's secretary to withdraw its funds from the Peoples-Pittsburgh Trust Company of Pittsburgh, Pennsylvania, and from the People's Bank of Elkton, Maryland, on checks of the company made payable to her. It was further alleged to be part of the scheme

to cause her to cash the checks and to deliver the cash to them, to conceal this misappropriation of funds by causing the expenditures to be charged to "Commissions" on the books of the corporation, and to thus increase their compensation as officers of the company without first obtaining approval of the Trust Company contrary to a loan agreement with the Trust Company (R. 1-4).[1]

Each of the five counts charged that the defendants for the purpose of executing said scheme caused to be placed in the mails at Elkton on the stated date a check drawn by the Triumph Explosives, Inc. on the Peoples-Pittsburgh and Trust Company (R. 4-11).

Verdict and sentence.—There was a verdict of guilty on all counts against both defendants. The defendant Kann was given a sentence of imprisonment of three years and a fine of $5,000, but execution of the sentence of confinement was suspended on condition of payment of fine, costs, and the additional sum of about $32,000 as restitution to Triumph Explosives, Inc. (Tr. 587).[2] Appellant was sentenced to imprisonment for three years and to pay a fine of $1,000 (R. 64).

The evidence.—In pertinent substance, the evidence showed:

Triumph Explosives, Inc., has long manufactured fireworks, and since 1939 ordnance. In 1941 and 1942 its ordnance contracts included those with The Netherlands and Chile (Tr. 55-56, 368). Gustav H. Kann was President and appellant Decker, since 1933, has been Executive Vice President of Triumph Explosives, Inc., at salaries of $1,050 and $18,000 per year, respectively (Tr. 60, 378-379). Of the total outstanding shares of the Company, Decker owned

[1] Apparently because it was guaranteed against loss, the theory of fraud on the Trust Company was not emphasized at the trial and was not relied upon by the Government on appeal.

[2] References to "Tr." are to the pages of the original transcript of record in accordance with stipulation (R. 127).

two or three per cent and Kann, with his brother and their two families owned about twenty per cent (Tr. 264, 266-268).

Elizabeth Jackson was the Assistant Secretary of the Company and personal secretary to Decker (Tr. 54, 56).

The Government offered in evidence nine checks totaling $84,106, dated between February 8, 1941, and April 23, 1942, and with the exception of one, all co-signed by Decker with either Kann or Criswell, the second Vice President of the Corporation (Tr. 67, 138). The five checks relied on in the indictment were all drawn on the Peoples-Pittsburgh Trust Company [3] (R. 4-11):

April 18, 1941	$13,703.50
July 21, 1941	1,300.00
August 14, 1941	5,200.00
January 14, 1942	10,312.50
April 23, 1942	20,625.00

Manner of drawing and charging checks on corporation's books to effect and conceal the fraud.—In each instance Miss Jackson, at the instruction of the defendants made out the check to herself as payee, took it to the People's Bank of Elkton and there cashed it, obtaining cash, or cashier's check or draft, or both (R. 79-80; Tr. 72-73, 98, 127-130, 135). As stated by Judge Chesnut in his opinion (R. 57): "All these checks were made payable to Miss Jackson and endorsed by her and cash therefor or cashier's checks received from the Elkton State Bank where the corporation had an account. In all, nine such checks were drawn and the proceeds immediately handed over by Miss Jackson to the defendants."

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[3] Four checks were drawn on the People's Bank of Elkton and not referred to in the indictment (Tr. 70-71):

February 8, 1941	$14,942.50
April 7, 1941	5,760.00
September 25, 1941	1,950.00
January 10, 1942	10,312.50

The result was that when the check was written, in the corporation's books the entry in the check register in each instance was carried into the ledger as a debit against Miss Jackson's account in the Accounts Payable ledger (R. 85; Tr. 132, 150-151).

Miss Jackson made up supporting vouchers to be sent to Mr. Vernon, the Comptroller, for entry of the charges on the corporation's books (Gov't. Exhibit No. 2, R. 83, Tr. 81-83). Each bore the direction "To Commission" at the direction of Decker or Kann (Tr. 88). These were approved by Mr. Decker before transmittal to the Comptroller in the Accounting Department (Tr. 82). When each voucher was received in the Accounting Department, a credit was made to her account in the Accounts Payable ledger and a corresponding debit was made either to the Commissions Account or to Prepaid Miscellaneous Expense. Of the $84,106 total for the nine checks, $69,163.50 was charged to the former account and $14,942.50 to the latter (Tr. 84, 88, 139-140, 145-146). Later, when the contracts reached the necessary stage the charges to Prepaid Miscellaneous Expense were closed into Commissions (Tr. 147-149). Thus, the books as kept showed that Miss Jackson got the money (R. 85, 91; Tr. 149-151).

Concealment from Board of Directors.—At a meeting of the board of directors, attended by Kann and his brother, Decker, Colonel Shirley and Mr. MacBryde, on October 1, 1942, the foreign commission items were discussed and it was stated that the Navy Department auditor had objected to certain commissions paid on foreign business and they would have to be straightened out—the sum of some $80,000 being stated as the amount involved. Neither Kann nor Decker told the directors who had received the money (Tr. 240-243). They stated that the names of the persons to whom the money was paid were a matter of confidence, but

that it was for the benefit of the corporation's business and all in connection with foreign contracts (R. 94-97; Tr. 243-246). The minutes of the October 1 meeting with reference to the foreign commissions were read at a subsequent meeting on October 7, 1942, attended by the two Kanns, Isaac Diamondstone, Mr. MacBryde and Colonel Shirley together with Mr. Townsend, Colonel Shirley's attorney, Mr. Weil, an attorney from Pittsburgh, and Mr. Sabel, the auditor (R. 258-259; Tr. 251-353). Mr. Sabel also brought the matter up, stating that the payment of the money had been questioned by the Government in connection with renegotiation (Tr. 260). The defendants stated that the money had been spent for commissions on foreign sales, but refused to name the persons who received the money (Tr. 256).

Disposition of proceeds of checks.—All of the proceeds of all nine checks were turned over to Decker or Kann by Miss Jackson (Tr. 79). Kann admitted that he had gotten some of the money (Tr. 348, 350, 352, 354, 379, 380, 382).

There was testimony that Decker admitted that he and Kann had each received one-fourth of the foreign commission amounts and asserted that the other one-half had been paid to persons he refused to name (Tr. 353).

Evidence that forwarding of checks by Elkton bank for clearance was not for the purpose of executing scheme.—Argus F. Robinson, cashier of the People's Bank of Elkton testified that the five checks drawn on the Peoples-Pittsburgh Trust Company cleared through his bank (R. 65). The same witness testified that all of the checks involved were cashed before they were sent to Pittsburgh. In each instance, Miss Jackson received the full amount of the check, either in cash or draft that were the same as cash (R. 79-80; Tr. 72, 73, 98, 127-130, 135). None of the checks were taken for collection and when they were cashed, the Elkton bank

became the owner of them. The drafts or cashier's checks with which some were paid were required to be honored by the Elkton bank no matter who might present them. When the checks were sent to Pittsburgh they were sent by the Elkton bank in its own right as owner of the checks to reimburse itself[4] (R. 71-72).

Appellant's motion for directed verdict for insufficiency of the evidence was overruled (Tr. 518-519). Motion in arrest of judgment and for a new trial was filed (Tr. 2). Opinion and order overruling said motion were filed July 24, 1943 (R. 55) and on August 12, 1943, judgment of fine and imprisonment was entered accordingly (R. 64).

Dealing with the contention that the evidence failed to show that the mailing of the checks was "for the purpose of executing" the fraudulent scheme, the Circuit Court of Appeals said (R. 124):

> "He [Decker] insists that when each check was cashed by the Elkton Bank and the proceeds were received, the fraudulent scheme had been entirely completed and, consequently, any subsequent mailing of the checks was not in furtherance of the fraudulent scheme.[5]

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[4] The average balance of Triumph Explosives, Inc., in the Elkton bank was $25,000 so that had any of the five checks failed to clear in Pittsburgh, the Elkton bank would have had the right to charge the checks back against the company and the money would have been there against which to collect it (R. 72).

[5] This statement by the court of petitioner's position is correct only if there be interpolated the words, "so far as it was to be executed by means of that particular check", so as to make the statement read:

> "He [Decker] insists that when each check was cashed by the Elkton bank and the proceeds were received, the fraudulent scheme, so far as it was to be executed by means of that particular check, had been entirely completed and, consequently, any subsequent mailing of the checks was not in furtherance of the fraudulent scheme."

A similar attempt to misstate our position in the court below was met with the following statement in our reply brief:

> "On the contrary appellant has clearly assumed throughout that, because of the series of check cashings, the evidence was adequate to

"To this, we think there are at least two sufficient answers.

"[1] Here the fraudulent scheme was clearly a continuing one. There is every reason to infer that the scheme would have continued more or less indefinitely until the detection of the fraud, which seems to have been effected largely through the investigations of Lieutenant Commander Seidman of the Price Adjustment Board of the Navy Department. This issue was also left to the jury by Judge Chesnut in the portion of his charge quoted above in this opinion.

"[2] Even if the scheme be limited to one isolated transaction, the cashing of a single check, we still think this contention lacks merit. The indictment charged a scheme to defraud Triumph, and Triumph was not defrauded, i. e., suffered no economic detriment, until the check had been received through the mail by the Pittsburgh bank and had been charged against Triumph's account in that bank. Thus, the complete and final success of the fraudulent scheme required the use of the mails for its ultimate successful consummation. *Tincher* v. *United States*, 11 F. 2d 18 [C. C. A. 4]; *Hart* v. *United States*, 112 F. 2d 128 [C. C. A. 5], cert. denied 311 U. S. 684; *United States* v. *Leche*, 34 F. Supp. 982, 118 F. 2d 246 [C. C. A. 5], cert. denied 314 U. S. 617; *Steiner* v. *United States*, 134 F. 2d 931 [C. C. A. 5]."

Accordingly, the judgment of the district court was affirmed (R. 125).

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support a finding that the scheme was single and a continuing one. It is our position that despite the continuing existence of the scheme to defraud, the mailing of the checks by the Elkton bank could not have been in furtherance of the continuing scheme because each mailing occurred only after the appellant had obtained the money for the particular check and after the corporation had been irretrievably subjected to liability for the amount of the check. * * * So far as the execution of the scheme is concerned the checks are thereafter obviously *functus officio*.

Specifications of Error to Be Urged.

The circuit court of appeals erred:

1. In holding that as to each individual check, the use of the mails by the Elkton bank was in furtherance of the scheme to defraud.

2. In failing to hold that there is no use of the mails for the purpose of executing the scheme to defraud where the mailing is of a check for collection (a) by a bank that has become holder in due course of the check (b) after the defendant has obtained cash for the check in consummation of the scheme as to that check (c) after the victim's loss on the check has become unavoidable.

3. In holding that where there is in existence a continuing scheme, any mailing of a check caused by defendant—even though the fraud as to that check already has been executed—is a mailing "for the purpose of executing such scheme" within the meaning of the statute.

4. In failing to hold that evidence merely that defendant has caused the use of the mails during the continuance of a scheme to defraud, in the absence of a showing that such use was intended, or did in fact tend to, attain the object of the fraud or conceal it, is insufficient as a matter of law to establish that such use was "for the purpose of executing such scheme" within the meaning of the statute.

Reasons for Granting the Writ.

The gist of the statutory offense with which petitioner is charged is the use, or the causing of the use, of the mails "for the purpose of executing such [fraudulent] scheme." *United States* v. *Young*, 232 U. S. 155, 161; *Hass* v. *United States*, 93 F. 2d 427, 429 (C. C. A. 8, 1938); *Stryker* v. *United States*, 95 F. 2d 601, 604 (C. C. A. 10, 1938); *Gates* v. *United*

States, 122 F. 2d 571, 577 (C. C. A. 10, 1941) cert. denied 314 U. S. 698.

Under the statute, there were four elements to be established: (1) The fraudulent scheme; (2) Use of the mails; (3) That petitioner caused such use; (4) That such use was "for the purpose of executing such scheme."

Petitioner concedes (1) that the evidence was adequate to support a finding of the existence of the fraudulent scheme and that it was a continuing one, and here waives the contention made in the court below and concedes (2) that the circumstantial evidence was sufficient to sustain a finding that the mails had been used by the Elkton bank in forwarding the checks to Pittsburgh. Petitioner throughout has also conceded (3) that the evidence is adequate as to causation, i.e., that, if such use was as a matter of law "for the purpose of executing said scheme," then the use of the mails by the Elkton bank in forwarding the checks to the Pittsburgh bank was a possibility so apparent as to justify a finding that petitioner did "cause to be placed" in the mails the checks in question.

The sole question is as to the fourth element, the gist of the crime: Whether the evidence is sufficient as a matter of law to establish that the use of the mails was "for the purpose of executing such scheme."

Our contention is that the evidence fails to show use of the mails "for the purpose of executing such scheme":

a. Because, as to each check, the mailing was after the cash had been paid to defendant and after the victim corporation had become legally obligated to reimburse the Elkton bank as holder in due course, each mailing by the Elkton bank was after the fraud as to that check was complete and so was not, within the meaning of the statute, "for the purpose of executing such scheme." So far as the scheme was to be executed or accomplished by means

of each particular check, the scheme was consummated when the cash was paid to the petitioner and the victim lost power to prevent the loss.

b. Because evidence merely showing a continuing fraudulent scheme, and a contemporaneous use of the mails by the defendant, without more, is clearly insufficient as a matter of law. There still remained to be satisfied the statutory requirement that the use of the mails be shown to be "for the purpose of executing such scheme". Plainly, the mailings were not to aid the obtaining of moneys on the subsequent checks. Furthermore, the record fails to show, and the court below failed to cite, any evidence that the mailing in any way furthered the continuing fraud by concealing it.

1. **A clear conflict of circuits is presented.**—To support the holding that the mailing by the Elkton bank was in furtherance of, or for the purpose of executing, the scheme, the decision of the circuit court of appeals was based on two separate grounds (R. 124): (1) that the scheme was a continuing one; (2) that as to each check, the scheme to defraud was not consummated, i. e., the Triumph Company was not defrauded, i. e., suffered no economic detriment, until the check had been received through the mail by the Pittsburgh bank and had been charged against Triumph's account in that bank."

This second ground of decision is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Stapp* v. *United States*, 120 F. 2d 898, 899 (1941).[6] There the victim purchased a cashier's check of

[6] It is hornbook law, of course, that where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, of equal validity with the other, and to be regarded as authority, equally with the other. *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143; *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. 160, 167; *United States* v. *Title Ins. Co.*, 265 U. S. 472, 486; *Richmond Co.* v. *United States*, 275 U. S. 331, 340.

the Paul's Valley bank with a check on his account in a Tyler, Texas, bank. He delivered the cashier's check to the defendant who the next day cashed it in pursuance of the fraudulent scheme. The victim's check was sent for collection through a Fort Worth bank and the use of the mails relied upon was the mailing of the check for collection to the Tyler bank by the Fort Worth bank. The Fifth Circuit held that when the Paul's Valley bank accepted the victim's check and the money was paid to the defendant, the victim was then and there defrauded. It reasoned:

> "Christian [the victim] could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatever in that transaction. None of the banks involved, was their agent, innocent or otherwise. The mailing of the letter from Fort Worth to Tyler was not in furtherance of the scheme and was not 'caused' by them."

The Fifth Circuit thus recognized the rule that where as here, defendant has obtained the cash which is the object of the fraud and the victim is without a legal defense to collection by the bank which holds the check and so cannot successfully intervene to stop payment to avoid the loss, the subsequent mailing of the check for collection is not, within the meaning of the statute, "for the purpose of executing the scheme."

The decision in the instant case is also in conflict with the decision in *United States* v. *McKay*, 45 F. Supp. 1001 (E. D. Mich. 1942) where the court said (p. 1006):

> "In both the *Stapp* case and the present case, it was beyond the power of the victim to intervene and stop payment on the check which was the subject of the mailing * * * because after it was cashed by the bank the bank became a holder in due course whose

rights against the drawer of the check could not be thus defeated."

The opinion of Judge Parker in *Tincher* v. *United States*, 11 F. 2d 18, 21 (C. C. A. 4, 1926) as to one of the three mailings involved in that case, is, and is cited as, precedent for the decision in the instant case (R. 124). But Mr. Justice Douglas, in his dissent in *Adams* v. *United States ex rel McCann*, 317 U. S. 269, 283, fn. 7, apparently recognized the conflict between the same circuits resulting from the *Tincher* case and the decision in *Stapp* v. *United States*, 120 F. 2d 898 (C. C. A. 5).

There is also a conflict in principle with the decision in *Dyhre* v. *Hudspeth*, 106 F. 2d 286, 288 (C. C. A. 10).

2. **The decision conflicts in principle with the opinions of the Circuit Court of Appeals for the Fifth Circuit upon which it relies.**—The court below, as did the district court (R. 62-64), refused to give effect to the fact that under the negotiable instruments law the Elkton bank upon cashing the checks became a holder in due course, *Dean* v. *Eastern Shore Trust Co.*, 159 Md. 219; *Standard Trust Co.* v. *Commercial Nat. Bank*, 240 Fed. 303; 1 Md. Ann. Code (1939), Art. 13, Sec. 76, and at the same instant the victim corporation lost power to intervene to stop payment and so avoid the loss (R. 125). On the other hand, both courts below relied heavily (R. 62, 124) upon the decisions in *Hart* v. *United States*, 112 F. 2d 128 (C. C. A. 5, 1940) cert. denied 311 U. S. 684, and *United States* v. *Leche*, 34 F. Supp. 982, aff'd 118 F. 2d 246 (C. C. A. 5, 1941) cert. denied 314 U. S. 617.

Yet mere cursory examination of the opinion in the *Hart* case makes it plain that it applies the same rule as in the *Stapp* case, and that the result there turned on the distinguishing fact that at the time of the mailing the defendant had not yet obtained payment in full from the cashing bank,

the bank had not yet become a holder in due course and the loss was not yet beyond the power of the victim to prevent. The defendant had received in cash only $25,000 of a $75,000 check and had been given a $50,000 deposit credit for the balance. The court therefore held (112 F. 2d 128, 131):

> The scheme to defraud was not at an end when Hart indorsed and presented the check to the bank for no one had yet been defrauded. Louisiana State University and Agricultural and Mechanical College, the State and its taxpayers sustained no actual loss until the check had been finally paid, and it is clear that before the Louisiana State University account was charged with this item the University might have intervened to stop payment and the fraudulent scheme would have been frustrated.

By weight of authority, the bank upon the mere crediting to the account of the depositor did not become a holder for value. *Thompson* v. *Sioux Falls Nat. Bank*, 150 U. S. 231; *Bridgetown Nat. Bank* v. *Way*, 253 Fed. 731, 733 (C. C. A. 4); *Southern Trust Co.* v. *Vaughn*, 277 Fed. 145; Brannan, Negotiable Instruments Law (6th ed.) sec. 25, pp. 375-376). Only to the extent that it advanced cash or withdrawals were made did it become pro tanto a holder in due course. *Southern Trust Co.* v. *Vaughn*, *supra*, 149; *Second National Bank* v. *Breitung*, 203 App. Div. 636, 197 N. Y. S. 375 (1922); *Freeport Bank* v. *Viemeister*, 227 App. Div. 457, 238 N. Y. S. 169; *Ashley & Rumelin* v. *Brady*, 41 Idaho 160, 238 Pac. 314; *Haschenberger* v. *Dennis*, 118 Neb. 411, 225 N. W. 25; *Hodge* v. *Smith*, 130 Wis. 326; *Cedar Rapids Nat. Bank* v. *Snoozy*, 55 S. Dak. 655, 215 N. W. 96; Bigelow, Bills, Notes and Checks (3rd ed.) sec. 477, p. 368 and cases cited; 2 Daniels, Negotiable Instruments (7th ed.), sec. 899, p. 954. Sections 27 and 54 of the Negotiable Instruments Law as carried into the Louisiana statutes, 1 La. Gen. Stats. 1939 (Dart) Secs. 816, 843.

Under these well established principles it was plain that at least with respect to the $50,000 deposit credit the Whitney bank was a mere holder, not for value, and therefore took title subject to all the defenses, both real and personal.

Hence, as the Fifth Circuit held, until the check had been finally paid by the drawee bank, the University had not been defrauded since its potential liability to loss was still subject to avoidance by intervention to stop payment.[7]

That the *Hart* case applies the same rule as the *Stapp* case and goes off merely on the facts was explicitly recognized by Judge Hutcheson who sat in both cases. *Steiner* v. *United States*, 134 F. 2d 931, 936.

Dealing with the two cases in *United States* v. *McKay*, 45 F. Supp. 1001, the court said (p. 1006):

> "But the apparent conflict [with the *Stapp* case] does not really exist when the opinion in the *Hart* case is carefully considered. It expressly recognized the rule that a use of the mail after the fraud was complete fails to bring the case within the statute, but held that the scheme to defraud in that case 'was not at an end

[7] There is some ground for the view that the Louisiana courts would have held the Whitney bank a holder in due course as to the full amount of the $75,000 check on the theory that the mere setting up of a deposit credit is payment for the check, rather than a promise to pay. See *In re Liquidation of Canal Bank & Trust Co.*, 181 La. 855, 877, 880, 160 So. 609. It appears that the Fifth Circuit decided the *Hart* case under the general law in the federal courts and under the majority rule under the negotiable instruments law, and perhaps ignored this Louisiana decision.

Explanation for the broad language of the *Hart* case, which apparently does not recognize the Whitney bank as even a *pro tanto* holder in due course, may be found in the fact that McCord, J. who wrote the opinion in the *Hart* case sat for many years as an Alabama state court judge. Under the Alabama decisions, the cashing bank would not become a holder in due course for any amount until the entire deposit credit was withdrawn. *Tatum* v. *Commercial Bank & T. Co.*, 185 Ala. 249, 64 So. 561; *Colorado Nat. Bank* v. *Western Grain Co.*, 218 Ala. 339, 118 So. 588; *Citizens Nat. Bank* v. *Buckheit*, 14 Ala. App. 511, 71 So. 82, cert. denied, 196 Ala. 700.

> when Hart indorsed and presented the check to the bank for no one had yet been defrauded." Its ruling was expressly based upon its interpretation of the law as applied to the facts before it, which, whether it was correct or incorrect, was that the drawer of the check "might have intervened to stop payment and the fraudulent scheme would have been frustrated.' "

It is thus apparent that, so far from supporting the decision of the circuit court of appeals in the instant case, the *Hart* case recognizes the rule which requires reversal on the facts of record in this case.

United States v. *Leche*, 34 F. Supp. 982, aff'd 118 F. 2d 246 (C. C. A. 5, 1941) is even more obviously distinguishable on its facts. There the mailing relied upon was the mailing to the defendant's bank for deposit of checks drawn by the victim and endorsed by the defendant. At that stage, liability had not been imposed beyond prevention by the victim nor had the accused secured the moneys which were the object of the fradulent scheme.

Plainly, the decision of the court below finds no support in the Fifth Circuit cases upon which it relies. On the contrary, the rule there applied requires reversal in the instant case.

3. **The alternative ground of decision is clearly without merit.**—The court below stated as its first ground of decision (R. 124):

> "Here the fraudulent scheme was clearly a continuing one. There is every reason to infer that the scheme would have continued more or less indefinitely until the detection of the fraud * * *. This issue was also left to the jury by Judge Chestnut * * *"

Despite the fact the scheme was admittedly a continuing one, the Government still had the burden of showing that the mailings were "for the purpose of executing" it. To

sustain this burden the court below cited no evidence and there was none. Therefore, even if it were pertinent to the question of conflict of circuits presented on petition for certiorari—and as shown above, being only one of two alternative grounds, it is not—this first alternative ground of decision advanced by the court below fails to meet the issue and is inadequate to support the judgment.

Conclusion.

The Circuit Court of Appeals for the Fourth Circuit rendered a decision in clear conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit. The jurisdiction of this Court is invoked to resolve the conflict.

Wherefore, it is respectiully submitted that this petition for a writ of certiorari should be granted.

February, 1944.

WILLIAM D. DONNELLY,
Counsel for Petitioner.

CUMMINGS & STANLEY,
Of Counsel.

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No. 729

In the Supreme Court of the United States

OCTOBER TERM, 1943

JOSEPH B. DECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 122–125) has not yet been reported. The opinion of the district court overruling the petitioner's demurrer to the indictment (R. 12–20) is not reported, and the opinion of that court overruling motions in arrest of judgment and for a new trial (R. 55–64) is reported at 51 F. Supp. 15.

JURISDICTION

The judgment of the circuit court of appeals was entered January 21, 1944 (R. 125). The petition for a writ of certiorari was filed Feb-

ruary 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the particular use of the mails charged in the indictment and proved at the trial was "for the purpose of executing" the scheme to defraud within the meaning of Section 215 of the Criminal Code (18 U. S. C. 338).

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, * * * writing, * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any such letter, * * * writ-

ing, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment, returned February 16, 1943, by a grand jury of the District of Maryland, charged petitioner and Gustav H. Kann, in five counts, with violating the mail fraud statute, 18 U. S. C. 338 (R. 1–11). Each count (Counts 2 to 5 by reference to Count 1) alleged that Kann and petitioner, as president and as vice-president and general manager, respectively, of Triumph Explosives, Inc. (hereinafter referred to as "Triumph"), devised a scheme to defraud Triumph, its stockholders, and Peoples-Pittsburgh Trust Company, Pittsburgh, Pennsylvania. The scheme alleged was one by means of which the defendants would misappropriate the funds of Triumph by causing Elizabeth Jackson, petitioner's secretary, to withdraw and turn over to them funds of Triumph obtained through the issuance of Triumph's checks payable to Miss Jackson and drawn on Peoples-Pittsburgh Trust Company and on the Peoples Bank of Elkton, Elkton, Maryland (R. 1–3). It was further alleged to be part of the scheme that the misappropriations thus effected were to be concealed by making it appear on the books of Triumph that Elizabeth Jackson received the money for commissions, and by falsely representing and pretending to the officers, directors, and employees of Tri-

umph that the checks were drawn for commissions due and payable by it (R. 3–4).[1] Each count charged that in execution of this scheme the defendants at Elkton, Maryland, caused to be placed in the mails a different check payable to Elizabeth Jackson and drawn on the Peoples-Pittsburgh Trust Company, Pittsburgh, Pennsylvania (R. 4–11).

Defendants' demurrer to the indictment was overruled (R. 12–20), and they were tried and found guilty on all counts (R. 55). Motions in arrest of judgment and for a new trial were overruled (R. 55–64), and petitioner was sentenced to imprisonment for three years and to pay a fine of $1,000 (R. 64).

On appeal to the Circuit Court of Appeals for the Fourth Circuit the conviction was affirmed (R. 122–125).

The pertinent facts, substantially all of which are undisputed, may be summarized as follows:

Nine checks totaling $84,106, dated between February 8, 1941, and April 23, 1942, drawn by Triumph, were offered in evidence by the Government (R. 77). All but one of these checks were co-signed by petitioner with defendant Kann or with Criswell, the second vice president of

[1] The defrauding of the Peoples-Pittsburgh Trust Company by increasing the compensation of the defendants, contrary to a loan agreement, was also alleged to be part of the scheme. This aspect of the case was not emphasized by the Government and is not in issue here.

Triumph (R. 76–77). Four of these checks were drawn on the Peoples Bank of Elkton, Maryland (R. 78–79).[2] The five checks forming the basis of the five counts in the indictment were all drawn on the Peoples-Pittsburgh Trust Company, Pittsburgh, Pennsylvania, payable to Elizabeth Jackson (R. 4, 6, 7, 9, 10, 76, 77, 78) and were as follows (R. 78–79):

April 18, 1941	$13,703.50
July 21, 1941	1,300.00
August 14, 1941	5,200.00
January 14, 1942	10,312.50
April 23, 1942	20,625.00

Miss Elizabeth Jackson, petitioner's personal secretary (R. 75), identified each of the checks and testified that, at the instruction of the defendants, she had successively made out each of the nine checks payable to herself, and had taken each to the Peoples Bank of Elkton, where she obtained cash, or drafts, or both, immediately turning the proceeds over to either Kann or petitioner (R. 79–88). She then made out an invoice, or voucher, at the direction of the defendants, clearing the transaction through her account with Triumph (R. 79, 83–85, 91). Each voucher bore the statement "To commission" and when entered on Triumph's books reflected that the amount had been paid to Miss Jackson and

[2] The amounts and dates of these checks were as follows:

February 8, 1941	$14,942.50
April 7, 1941	5,760.00
September 25, 1941	1,950.00
January 10, 1942	10,312.50

charged to commissions on foreign contracts (R. 83–84). The amounts of the checks were determined by computing 5% of final payments on contracts between Triumph and certain foreign governments, or 2½% on advance payments thereon (R. 88).

The five checks drawn on the Peoples-Pittsburgh Trust Company, when cashed by the Peoples Bank of Elkton, were duly transmitted by it through the mails to the Peoples-Pittsburgh Trust Company, where they were honored (R. 65–72).

ARGUMENT

Petitioner concedes (Pet. 11) the sufficiency of the evidence to support findings (1) that there was a *continuing* scheme to defraud, (2) that the mails were used by the Elkton Bank in forwarding the checks to Pittsburgh, and (3) that petitioner caused the checks to be placed in the mails. He contends, however, that the evidence is insufficient as a matter of law to establish that the mails were used "for the purpose of executing such scheme", because the Elkton Bank, upon cashing each check, became a holder in due course, and at the same instant the scheme to defraud as to that check was at an end since the victim corporation could not stop payment and avoid loss (Pet. 11–12).

There is no merit in petitioner's contention, for it completely disregards the facts with reference to the nature of the scheme itself, and

uses as a criterion the technical question of liability under the law of negotiable instruments. As Judge Chesnut stated in his memorandum opinion overruling the motions in arrest of judgment and for a new trial (R. 64):

> * * * the technical question of negotiable instruments law is not the conclusive factor in determining whether the defendants caused the mailing of the checks in furtherance of the scheme. That the Elkton bank became the holder of the checks in due course is merely one fact to be considered in determining whether the defendants caused the mailing of the checks in furtherance of the scheme. This ultimate question depends largely upon the nature of the scheme itself which in this case we have seen was a continuing one which contemplated ultimate withdrawal of the funds from the Pittsburgh bank.

If the defendants had been "hit and run" defrauders, it might be argued with greater plausibility that the scheme to defraud was at an end when the money was obtained from the Elkton Bank, for in such a case the purpose of the scheme would have been to abscond with the money after the first check had been cashed, and it would have been immaterial whether the checks cleared or not. *Stapp* v. *United States,* 120 F. (2d) 898, 899 (C. C. A. 5). However, that was not the scheme of the defendants. They were officers of the corporation and there is nothing

to indicate that they contemplated flight. Rather, as the indictment alleged and the proof showed, it was a part of their scheme to cover up their misappropriations. Naturally, they did not intend to be discovered and it was a most vital and important part of the scheme that the checks clear and be charged to Triumph's account with the Pittsburgh bank. Indeed, they contemplated that very eventuality by making it appear on Triumph's books that Elizabeth Jackson, the personal secretary of petitioner, received the money for commissions.[3] It is well settled that the use of the mails, even after the money is received, for the purpose of assisting in retaining the money or of indefinitely delaying or preventing the discovery of the fraud is within the purview of the mail fraud statute. *Hastings* v. *Hudspeth,* 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Davis* v. *United States,* 125 F. (2d) 144 (C. C. A. 6); *Bogy* v. *United States,* 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Creech* v. *Hudspeth,* 112 F. (2d) 603, 606 (C. C. A. 10); *Lewis* v. *United States,* 38 F. (2d) 406, 415 (C. C. A. 9); *Brady* v. *United States,* 26 F. (2d) 400, 401 (C. C. A.

[3] As the court below pointed out (R. 124), "There is every reason to infer that the scheme would have continued more or less indefinitely until the detection of the fraud, which seems to have been effected largely through the investigations of Lieutenant Commander Seidman of the Price Adjustment Board of the Navy Department." (See R. 110–119.)

9), certiorari denied, 278 U. S. 621; *Newingham* v. *United States,* 4 F. (2d) 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703; *Freeman* v. *United States,* 244 Fed. 1, 9–10 (C. C. A. 7), certiorari denied, 245 U. S. 654; *Farmer* v. *United States,* 223 Fed. 903, 910 (C. C. A. 2), certiorari denied, 238 U. S. 638. Hence, even if the scheme had encompassed only one transaction, the mailing would have been within the interdiction of the act.

Moreover, as petitioner concedes (Pet. 11), the fraudulent scheme was a continuing one. It is evident that such a continuing scheme would not have been possible without the proper clearance of each successive check, especially in view of the fiduciary relationship existing between the defendants and the victim. Such clearance was accomplished by the use of the mails.[4]

Petitioner relies heavily on *Stapp* v. *United States,* 120 F. (2d) 898 (C. C. A. 5), *Dyhre* v. *Hudspeth,* 106 F. (2d) 286, 288 (C. C. A. 10), and *United States* v. *McKay,* 45 F. Supp. 1001 (E. D. Mich.), and asserts that the decision below is in direct conflict with the decision of the Cir-

[4] That the jury so found is apparent from the trial judge's instruction (R. 40):

"Furthermore, you must find beyond a reasonable doubt that the sending through the mails of one or more of the five checks was in execution or attempted execution of the fraud on the corporation; and you must find that the checks, if they were mailed, were mailed while this scheme to defraud was still continuing."

cuit Court of Appeals for the Fifth Circuit in the *Stapp* case (Pet. 12–14, 18). But those cases are clearly distinguishable on their facts.[5] The courts there recognized and applied the rule that use of the mails after the fraudulent scheme had already been completed is not within the purview of the statute. That is not the situation here. The scheme of the defendants in the instant case had not ended upon the cashing of the

[5] In the *Stapp* case the victim purchased with his personal check a cashier's check payable to Rudder, one of the defendants, and turned it over to Rudder, who cashed it the next day. The victim's check was subsequently sent through the mails to the drawee bank for collection. The court held that the purpose of the scheme to defraud had been completely carried out when the money was paid to Rudder. The defendants at that time had already accomplished all that they had set out to do, the use of the mails was only incidental, and the defendants had no interest in that phase of the transaction.

In the *Dyhre* case the indictment first alleged a general scheme to defraud named business houses in Lake Providence, Louisiana, by passing worthless checks in exchange for merchandise, and then, in each of eight counts, charged the passing of a particular check which the defendant caused to be sent through the mails for clearance "for the sole and only purpose of defrauding said corporation of the amount of said check" (106 F. (2d), at 286–287). After holding that the mailings were not in execution of the schemes alleged, the court stated that "it can not be reasonably contended that there was one fraudulent scheme" as each person who was induced to cash defendant's checks "was separately defrauded by representations made to him alone, the pleader so charged them, and the Grand Jury found that each count was a separate offense. The defrauding of one had no connection with the defrauding of another" (p. 288). In the present case, the indictment charges only one general con-

checks by the Elkton Bank. To the contrary, as we have shown (*supra,* pp. 7–9), the clearance of the checks was not only in furtherance of, it was essential to, the effectuation of the scheme to defraud. Until those checks had been mailed to and paid by the Peoples-Pittsburgh Trust Company, the account of Triumph had been charged with the items, and all necessary vouchers, book entries and other acts and methods of concealment had been accomplished, the scheme to defraud was not consummated. *Steiner* v. *United States,* 134 F. (2d) 931 (C. C. A. 5); *Davis* v. *United States, supra; Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5), certiorari denied, 311 U. S. 684; *Bogy* v. *United States, supra; Lewis* v. *United States, supra; Tincher* v. *United States,* 11 F. (2d) 18 (C. C. A. 4), certiorari denied, 271 U. S.

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tinuing scheme to defraud and the mailing of five checks each in furtherance of the same scheme.

In the *McKay* case the schemers caused Edsel Ford, upon misrepresentation of facts, to purchase two cashier's checks at the Manufacturer's National Bank, Detroit, payable to Bass-Luckoff, Inc. These checks were deposited by the payee. The proceeds of one of the checks was used to purchase a cashier's check payable to McKay. Bass-Luckoff, Inc., gave McKay its own check for part of the proceeds of the other check purchased by Ford. McKay cashed the checks at a bank in Grand Rapids, and the mailing of the checks by that bank to the Detroit bank was the basis of the indictment. The court held that the scheme alleged was one to defraud Ford; that it was fully consummated when he caused cashier's checks to be delivered to Bass-Luckoff, Inc.; and that the subsequent use of the mails was not in execution of the scheme to defraud Ford, the checks not being those of the victim, who had long since parted with his money.

664; *Newingham* v. *United States, supra; United States* v. *Leche,* 34 F. Supp. 982 (W. D. La.), affirmed 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Preeman* v. *United States, supra; Farmer* v. *United States, supra.*

CONCLUSION

This case was correctly decided below, there is no real conflict of decisions, and the petition for a writ of certiorari presents no question of general importance. We, therefore, respectfully submit that it should be denied.

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REPLY BRIEF FOR PETITIONER.

WILLIAM D. DONNELLY,
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CUMMINGS & STANLEY,
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REPLY BRIEF FOR PETITIONER.

The Government apparently recognizes the conflict between the *Stapp* case (120 F. 2d 898) and the decision of the court below, in so far as it rests on the ground stated by the court, i. e.: "Triumph was not defrauded, i. e., suffered no economic detriment until the check had been received through the mail by the Pittsburgh bank and had been charged against Triumph's account in that bank" (R. 124).

The reasoning is so plainly unsupportable, and so plainly in conflict with the decision in the *Stapp* case that the Gov-

ernment now seeks to buttress and distinguish the instant case on the ground that it comes within the well-recognized rule that use of the mails to prevent discovery of a fraud is, within the meaning of the statute, a use "for the purpose of executing such scheme."[1]

We do not question the correctness of the rule to which the Government cites (Br. Opp., p. 8).

The Government's brief in opposition is based solely upon assumed facts for which it furnishes no citations and which are without foundation in the record.

1.

The Government's argument is completely baseless because it proceeds upon an assumption of non-existent facts. There is nothing in the record to support, and it is notable that the Government altogether omits any record citation to sustain, the assertion (Br. Opp., p. 8):

> it was a most vital and important part of the scheme that the checks clear and be charged to Triumph's account with the Pittsburgh bank.

Neither does the Government cite to the record to support its reiteration (Br. Opp., p. 11).

> Until those checks had been mailed to and paid by the Peoples-Pittsburgh Trust Company, the account of Triumph had been charged with the items and all necessary vouchers, book entries, and other acts and

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[1] In other words, there is clear conflict of circuits but the Government now opposes the petition on the ground that the result below is right under another theory. Contention that a decision is correct will not, of course, defeat a writ of certiorari based upon a conflict of circuits. See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, sec. 292, p. 564, Fns. 4-6.

> methods of concealment had been accomplished, the scheme to defraud was not consummated.[2]

It is highly significant that, although this same argument was urged in the circuit court of appeals, the opinion of Judge Dobie does not go on this ground or invoke this theory (R. 124).

So far from supporting these naked assertions of fact by the Government, the record clearly discloses that the sending of the checks to Pittsburgh in no way aided in concealing the fraudulent scheme and was in no way requisite to, or a step precedent in, the making of the concealing entries on the books of the corporation.

All of the concealment through false entries was shown to have been obtained or provided for at the time the check was issued by the Corporation. At the time the first check of the series was drawn, Miss Jackson was directed to make up an invoice or voucher to clear the charge through her account (R. 79). She made up vouchers in all instances to go through the books of the Corporation (R. 83, Tr. 134). At or shortly after the time she prepared the checks for signatures she had them "O.K'd" by Decker and gave them to Mr. Vernon, the Comptroller (Tr. 82-83). He put the charges on the books (Tr. 82-83). These vouchers are all in evidence as Govt. Exh. No. 2 (R. 85). Thus immediately the check was written she was charged through the check register with the amount of the check in an account in her name in the Accounts Payable ledger (R. 85, Tr. 132, 150-151). By virtue of the vouchers in each instance, her account in the Accounts Payable ledger was credited and a

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[2] This is a curious argument. Without directly stating, or assuming responsibility therefor, its negative form is plainly calculated to produce in the mind of the reader the inference that "vouchers, book entries, and other acts and methods of concealment," occurred subsequent to, and were consequent upon the mailing of each check.

debit was made to the Commissions or Prepaid Miscellaneous Expense account (Tr. 86-88, 139-140, 145-146).

This office accounting procedure which concealed the fraud by causing the books to falsely show that the checks issued were for commissions to Miss Jackson manifestly occurred *prior* to the mailing of the checks here in question and obviously was in no way dependent upon, and had not the slightest relation to, the forwarding of the checks to the Pittsburgh bank or to the other return of the canceled checks to the corporation.

Neither is there support in the record for any contention that had the Pittsburgh bank failed to pay any of the checks the fraud would have been discovered. This contention or inference might be acceptable had the defendants been clerks or inferior officers, but here they were in control of the corporation. It is plain that had the Pittsburgh bank failed to pay any of the checks, the defendants by virtue of their managerial control could have directed the Elkton bank to reimburse itself from deposits of the company in that bank which were at all times sufficient for that purpose (Tr. 326). Indeed, it appears that the withdrawals from the Peoples-Pittsburgh Trust Company were merely incidental to the scheme since the choice between the Pittsburgh bank and the Elkton bank as drawee was made not by the defendants, but by Mr. Vernon, the company comptroller, and Miss Jackson each time a check was written (Tr. 131). That payment or non-payment by the Pittsburgh bank was irrelevant in view of the managerial position of the defendants is also apparent from the evidence that, even after discovery of the false entries by Navy auditors, the reports of the defendants in explanation as to the use of the money were accepted without question by the Board of Directors (See Petition, pp. 6-7). It is thus apparent that there was an utter lack of evidence that payment of the checks by the Pittsburgh bank added anything to the concealment of the

fraudulent nature of the transaction. This Court may well take judicial notice of the fact that accounting entries occasioned by issuance of checks are made by a corporation not when the check clears through the drawee bank, but rather at the time the check is issued.

The record permits only of the conclusion that as to each check the scheme to defraud was consummated with the cashing of the check by the Elkton bank and the withdrawals from the Pittsburgh bank contributed in no way to prevention of discovery nor to the making of the vouchers, book entries, or doing of other acts of concealment.

The record signally fails to support the Government's assertion that there is in this case an element of concealment through mailing which was not present in the *Stapp* case.

2.

Despite the fact that the conflict upon which petitioner relies is based upon the second ground of decision in the circuit court of appeals, the Government bases its opposition to the petition, in part at least, upon the alternative ground advanced by the court below (R. 124): "Here the fraudulent scheme was clearly a continuing one." This, of course, does not obviate the conflict and hence requires no consideration now. It should be noted, however, that the argument of the Government on this point based on substantially the same supplemental theory of use of mails for concealment is not only without support in the record, but contrary to reason. The Government asserts (Br. Opp., p. 9):

> There is evidence that such a continuing scheme would not have been possible without the proper clearance of each successful check, especially in view of the fiduciary relationship existing between the defendants and victim.

There is, of course, no evidence to support this assertion and the Government cites none.[3] As shown above, the fiduciary relationship existing between the defendants and the victim not only lends no support to, but clearly vitiates, any inference that proper clearance of each check was essential to the continuing scheme. The fiduciary relationship of these defendants was that of managers and non-clearance of checks would have left them free to provide for payment directly from the funds of the company in the Elkton bank. Certainly non-clearance bore no threat to the continuance of the scheme.

Conclusion.

The Solicitor General of the United States in this Court fail to furnish a single record citation for the alleged distinguishing facts upon which he solely relies, there must manifestly arise at least a grave doubt as to the existence of those facts. Certainly the application for a writ is not lightly to be denied on his mere ipse dixit.

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[3] Discovery by the court below that this argument of the Government is without support in the record may explain the inadequacy of that part of the opinion which rests on the alternative ground of decision (R. 124): "Here the fraudulent scheme was clearly a continuing one." In voting the case, the circuit court of appeals apparently accepted the Government's argument as valid. But in writing the opinion, Judge Dobie seems to have recognized that there was no support in the record for assertion that clearance of each check was essential to the continuing scheme. For he was forced to place this alternative basis of decision on the plainly insufficient ground merely that this "scheme was clearly a continuing one" without more (R. 124). Obviously the mere contemporaneity of a continuing scheme and a use of the mails does not make such use necessarily one "for the purpose of executing such scheme." Therefore, had the record facts justified, it may reasonably be supposed that Judge Dobie would have supplied the missing element by statement that mailing of the checks for clearance aided the fraud by concealing it. His omission to do so is striking confirmation that the record facts in this case will not sustain any such assertion.

It is therefore submitted that the writ should be granted and the conflict of circuits resolved.

Respectfully,

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